United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7013

B/S

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CAPITAL GROWTH COMPANY, S.A. (Costa Rica), CAPITAL GROWTH COMPANY, S.A. (Panama), NEW PROVIDENCE SECURITIES, LTD., S.A., SHEFFIELD ADVISORY COMPANY, SHEFFIELD ADVISORY COMPANY, S.A., CLOVIS W. McALPIN, and SANFORD C. SHULTES,

Defendants,

and

ARIEL E. GUTIERREZ, ENRIQUE H. GUTIERREZ and EHG ENTERPRISES, INC.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District of New York

Answering Brief of the Securities and Exchange Commission

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Answering Brief of the Securities and Exchange Commission

This is an appeal by defendants EHG Enterprises, Inc. ("EHG"), Ariel Gutierrez and Enrique Gutierrez (collectively referred to as the "EHG Group") from the denial by the Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, on November 25, 1974, of their motion to vacate the order preliminarily

enjoining them and appointing a receiver for the Capital Growth companies, which was entered on September 24, 1974 (67A-71A).[1/]

In a memorandum opinion dated December 31, 1974, Judge Stewart set forth his findings of fact and conclusions of law with respect to the order he had issued on September 24, 1974, against the various defendants, including the EHG Group (113A-131A).

COUNTERSTATEMENT OF THE ISSUES

1. Did the district judge abuse his discretion in reaffirming the preliminary injunction that he had entered against the EHG Group defendants on September 24, 1974, and his order appointing a receiver for the Capital Growth companies issued that same day, under circumstances where

a) the district court concededly had jurisdiction over the persons of the EHG Group defendants at the time the preliminary injunction order was entered;

b) the EHG Group knew the substance of the Commission's allegations against them and had received actual notice that the Commission had applied for, and the court was considering, the entry of a preliminary injunction and other orders; and

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1/ References to pages of the Appendix filed by appellants are cited as "___A." References to pages in the volume of exhibits submitted by appellants are cited as "E-___." References to pages in the brief filed by appellants are cited as "Br. __." References to pages in the various transcripts of hearings held in this matter include reference to the date of the particular transcript as well as the relevant page. For example, testimony that appears on page 1 of the transcript of the hearing held on September 13, 1974, will be cited as "9/13 TR. 1."

c) despite the opportunity given them by the district judge upon his reconsideration of the preliminary injunction, the EHG Group did not introduce any evidence to contradict the facts presented by the Commission in support of its motion for injunctive and other relief?

2. Did the district judge abuse his discretion in entering a preliminary injunction against the EHG Group where the uncontroverted evidence presented by the Commission showed that the EHG Group had engaged in a series of transactions under circumstances where the conclusion is compelled that those transactions were not arms-length and were effected to benefit the EHG Group and other defendants at the expense of the Capital Growth companies?

COUNTERSTATEMENT OF THE CASE

The Commission's Complaint

On September 3, 1974, the Commission filed a complaint in the United States District Court for the Southern District of New York in which it alleged that the ten defendants named in the complaint had violated antifraud provisions of the federal securities laws (4A-19A-ii).[2/] In addition to the EHG Group the other defendants named were Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Clovis W. McAlpin,

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2/ Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 CFR 240.10b-5.

Sheffield Advisory Company, Sheffield Advisory Company, S.A., and Sanford C. Shultes.[3/] Capital Growth Company, S.A. (Panama), which was formed in August 1972, is a wholly-owned subsidiary of Capital Growth Company, S.A. (Costa Rica). The preferred shares of Capital Growth (Costa Rica) are held by approximately 16,000 public investors and its common stock is wholly-owned by the defendant New Providence Securities Ltd., S.A. Clovis McAlpin owns or controls over sixty percent of the voting securities of New Providence (115A-116A). New Providence also was the investment manager for the Capital Growth companies.(4A-19A-ii; 115A-116A).

Specifically, the Commission in its complaint alleged that the defendants, singly and in concert, had engaged in a course of conduct whereby the assets of the Capital Growth companies were misappropriated for the benefit of the other defendants. While this alleged course of conduct consisted primarily of a series of self-dealing transactions, it also included, among other things, the elimination of the independent trustee for the Capital Growth companies, the close-ending of those investment companies without adequate notice to the shareholders thus depriving them of their right to redeem their shares in those companies, and the diversion of assets of the Capital Growth companies into investments in closely-held, newly-formed entities that were owned or controlled by certain of the defendants and persons associated with them . (9A).

3/ On October 30, 1974, Sheffield Advisory Co. and Shultes consented to the entry of a permanent injunction. On December 16, 1974, Sheffield Advisory Company, S.A. also consented to the entry of a permanent injunction. (115A). On March 3, 1975, default judgments of permanent injunction were entered by the district court against Capital Growth, S.A. (Costa Rica), Capital Growth, S.A. (Panama), New Providence Securities, Ltd., S.A. and Clovis W. McAlpin.

The transactions alleged in the complaint were described more fully in an affidavit executed by Jerald A. Lanzotti, who was primarily responsible for conducting the Commission's investigation that resulted in the filing of this action. His affidavit and the exhibits thereto, which were filed in support of the Commission's request for a preliminary injunction against the defendants, sets forth several instances of self-dealing and non-arms-length transactions which benefitted various defendants, including the EHG Group, and which appear to have contributed substantially to the decline in the assets of the Capital Growth companies, from approximately $78 million in liquid investments in 1968 to approximately $14.2 million in illiquid investments as of August 1974. (33A-47A).

Among the transactions described in the Lanzotti affidavit (40A-42A) is one where a sale by EHG of shares of its common stock to the Capital Growth companies, at a price grossly in excess of the actual equity interest received in EHG, resulted in the transferral of substantial assets of the Capital Growth companies to the defendants EHG Group, New Providence Securities and Clovis McAlpin.[4/]

In another complex series of transactions described in the Lanzotti affidavit (42A-43A), liquid assets of the Capital Growth companies in effect were exchanged for notes of an EHG subsidiary which, with one exception, have not yet been paid. In connection with these transactions, a purported payment of $20,000 by the EHG Group to

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4/ This transaction is discussed in greater detail at pp. 27-29, infra.

the Capital Growth companies in consideration for extending the due dates on the notes admittedly was made payable by that Group to the account of Clovis McAlpin (90A-91A; E-312). 5/

The Commission's request for injunctive and other relief.

Because of the serious nature of the allegations set forth in its complaint and particularly in light of the possibility that some of the defendants would seek to secrete or otherwise dissipate assets of the Capital Growth companies during the pendency of this action, the Commission asked the court, at the time it filed its complaint, to issue an order to defendants to show cause why a preliminary injunction should not be entered and a receiver appointed pending the final determination of the action and, pending the hearing on those matters, to enter an order temporarily restraining the defendants from further violations of the federal securities laws and from taking certain other actions (27A-28A). The district judge scheduled a hearing on the Commission's request for a restraining order for 4:30 p.m. on the afternoon of September 3, 1974 (93A). 6/

At the hearing on the afternoon of September 3, 1974, counsel for the Commission urged that the Commission's request for an Order to Show Cause and for temporary relief be granted. Counsel

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5/ These transactions also are described in greater detail at pp. 29-31, infra.

6/ The Commission's staff caused copies of the complaint and its draft Order to Show Cause and request for a temporary restraining order to be hand-delivered to Laurence Greenwald, Esquire, of the firm of Stroock & Stroock & Lavan on September 3. (93A). In the past, that firm had represented the EHG Group in connection with various matters before the Commission and, in fact, had represented the Gutierrez brothers during the Commission's investigation in this matter (31A; 51A). When informed of the Commission's lawsuit on September 3, Mr. Greenwald told the staff that his firm had not yet been retained to represent the Gutierrez brothers or EHG in that action (93A).

representing the defendants Sheffield Advisory Company, Sheffield Advisory Company, S.A., and Sanford C. Shultes also appeared. No representatives of any of the other defendants appeared. After hearing argument from counsel, the district judge granted the Commission's request for a temporary restraining order (9/3 TR. 12; 55A); he set September 13, 1974, as the date for the hearing on the Commission's motion for a preliminary injunction and the appointment of a receiver for the Capital Growth companies (9/3 TR. 14). Notwithstanding that he had granted the restraining order, the district judge indicated that he would be available the following day to consider any requests from any of the defendants that the restraining order be vacated or modified (9/3 TR. 12; 55A). He ordered counsel for the Commission to serve copies of the Order to Show Cause and the temporary restraining order, and the papers upon which they were based, on all the defendants by 5:00 p.m. on September 4, 1974 (26A). Service on the EHG Group was to be made by mailing copies of the papers by certified mail, return receipt requested, to the offices of EHG Enterprises, Inc. in San Juan, Puerto Rico (25A). Copies also were to be delivered to Stroock & Stroock & Lavan (id.). Counsel for the Commission complied fully with the district court's order (94A).

In addition to directing the Commission's counsel to serve the EHG Group with copies of the Order to Show Cause and the restraining order and the papers upon which they were based, the court indicated that Commission counsel should advise the EHG Group of the hearing scheduled for the next afternoon for the purpose of allowing any additional arguments with respect to the continuation of the restraining order (55A). After the

hearing, Commission counsel placed a telephone call to Puerto Rico to Ariel and Enrique Gutierrez, who were the President and Chairman of the Board of Directors of EHG Enterprises, Inc., respectively (7A, 110A). While Enrique Gutierrez could not be reached, Commission counsel did speak to Ariel Gutierrez's wife and advised her of the substance of the Order to Show Cause and the temporary restraining order which had been entered that day, as well as the fact that a further hearing would be held the following day to consider any modifications to the temporary restraining order (93A-94A). Later that evening, Commission counsel spoke directly with Ariel Gutierrez and related the same information to him (94A). 7/ During that conversation, Mr. Gutierrez advised the Commission's attorney that he thought he was represented by the firm of Stroock & Stroock & Lavan (57A).

The next morning Commission counsel contacted the Stroock firm concerning the hearing scheduled for that day. The firm reiterated that it had not yet been retained to represent the Gutierrez brothers or EHG (57A). 8/ Neither EHG, the Gutierrez brothers nor anyone representing them appeared at the hearing held on September 4, 1974, to contest the temporary restraining order. After giving further consideration to the matter, the district judge decided to continue his original

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7/ Ariel Gutierrez stated that he would relay the information to his brother, Enrique (94A).

8/ The staff had also received a letter from Mr. Greenwald of the Stroock firm on September 4, in which he repeated what he had told the staff the previous day -- that the Stroock firm had not "as of the present time been retained" to represent the EHG Group in the Commission's action. He suggested that the staff might contact EHG and the Gutierrez brothers directly. (94A).

order pending the hearing on the Commission's motion for a preliminary injunction and other relief (9/4 TR. 60).

On September 5, 1974, counsel for the Commission called Ariel Gutierrez in Puerto Rico to inform him that the time for the hearing scheduled to be held on September 13, 1974, had been changed from 9:30 a.m. to 10:00 a.m. (95A). This time change was confirmed the following day in a letter from Marvin E. Jacob, Esquire, Associate Administrator of the Commission's New York Regional Office, to Ariel Gutierrez (id.).

On September 10, 1974, three days before the scheduled hearing, the staff again called Ariel Gutierrez to inquire whether he and his brother Enrique had retained counsel and intended to appear at the hearing (id.). Mr. Gutierrez indicated that he had not yet retained counsel and he doubted that he or his brother would be appearing at the hearing scheduled for September 13, 1974 (id.).

The hearing was held as scheduled on September 13, 1974. While counsel representing the Sheffield companies and Sanford Shultes appeared, none of the other defendants did, even though the Commission had given the notice directed by the court (59A). Because of the failure of seven of the ten named defendants to appear or otherwise oppose its motions, the Commission submitted a proposed order of preliminary injunction with respect to those defendants for the court's consideration

(59A, 61A).[9/] The Commission indicated that it intended to submit to the court "shortly" its proposed findings of fact and conclusions of law to support its proposed order (62A).[10/]

In connection with consideration by the court of any proposed findings to be filed by the Commission with respect to those defendants who did not appear, counsel for Mr. Shultes and the Sheffield companies expressed some concern that since the Commission's complaint had alleged, in part, a broad conspiracy among the defendants, his clients might be prejudiced if the court were to enter findings that the other defendants had engaged in a conspiracy before he had an opportunity to present fully his clients' case (9/13 TR. 9-13). Although the district judge recognized that the entry of findings against the non-appearing defendants could possibly have some effect on the case of the defendants who did appear, he stated that "any findings that are entered while the other defendants are in default would probably be subject to modification if those defendants cure their default and appear and ask for an opportunity to have the findings modified or changed" (9/13 TR. 10). In any event, Commission counsel pointed out that, since counsel for the appearing defendants would be served with the Commission's proposed findings and conclusions, he would have the opportunity to present his views to the court (9/13 TR. 11).

9/ The proposed order did not apply to the defendants who appeared since the parties agreed to a postponement of the hea ng for the preliminary injunction with respect to those defendants until October 21, 1974. In the interim, the parties agreed to extend the restraining order that had been entered originally on September 3, 1974, and the court accepted this arrangement (9/13 TR. 7).

10/ The district judge expressed some interest in having the Commission's proposed findings filed promptly (9/13 TR. 11-13).

After the close of the September 13 hearing, the district judge entered an order extending the temporary restraining order that he originally had issued on September 3, 1974, as to the defendants who did not appear at the hearing (1A).[11/] By its terms, the extended order would expire on September 23, 1974.

A copy of the complaint filed by the Commission in this action and the summons were personally served upon EHG and the Gutierrez brothers in San Juan, Puerto Rico, on September 19, 1974 (E-324 - E-325).

On September 24, 1974, the day after the extended restraining order expired,[12/] another hearing was held on the Commission's request for a preliminary injunction and other relief. In addition to Commission counsel and counsel for the Sheffield companies and Sanford Shultes, an attorney from Costa Rica appeared on behalf of the Capital Growth companies. At the hearing, counsel for the Capital Growth companies urged the court to consider the effect of Costa Rican law on any orders that it might enter against the Costa Rican defendants. According to counsel, some of the relief sought by the Commission would be impossible to enforce under Costa Rican law (9/24 TR. 5-6, 13-14).

The court viewed the appearance of counsel for the Capital Growth companies to be for the purpose of contesting the court's jurisdiction over

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11/ A copy of the temporary restraining order as extended is set forth in the Supplemental Appendix to this brief.

12/ The court entered an order on September 24 extending the temporary restraining order an additional two days during which time it contemplated holding a hearing on the Commission's motion for a preliminary injunction (1A). In fact, the hearing was held that very day.

the Costa Rican defendants (9/24 TR. 14-15). Although the district judge indicated that he would consider the arguments that Capital Growth's counsel had agreed to submit the following day concerning the court's jurisdiction (9/24 TR. 24, 26), he decided to enter a preliminary injunction that day against those defendants, including the EHG Group, who had not appeared or otherwise opposed the Commission's request for injunctive relief and the appointment of a receiver (9/24 TR. 24-25).[13/] The district judge indicated that while he was issuing his order of preliminary injunction and appointment of a receiver[14/] at that time because of the "unusual circumstances" of the case, he expected that counsel would "come to me at any point if you have problems which we have not anticipated which need to be dealt with, which would require a modification, for example, of the order" (9/24 TR. 30).

13/ In entering the preliminary injunction against the Capital Growth companies, the district judge recognized that the situation with respect to those defendants had then changed since they had appeared in the action (9/24 TR. 25-26). He indicated that he would consider any arguments that Capital Growth wished to make and, if necessary, he would modify his injunction (9/24 TR. 24).

14/ While the district judge decided to appoint a receiver for the Capital Growth companies, he stated that he did not expect the receiver immediately to take any action except to act as the court's representative at meetings to be held among the various parties (9/24 TR. 26).

Conformed copies of the court's order were mailed on September 26, 1974, by the Commission's counsel to EHG Enterprises, Inc. and Ariel and Enrique Gutierrez in Puerto Rico (95A, 127A).

The EHG Group's "Special Appearance" to vacate the preliminary injunction and for other purposes

On October 15, 1974, three weeks after the district judge issued his order of preliminary injunction and appointment of a receiver, counsel for the EHG Group met with counsel for the Commission to request a stipulation to extend for an additional 30 days the time within which the EHG Group could answer the Commission's complaint. 15/ Commission counsel agreed not to seek a default judgment against the EHG Group and submitted to them a draft stipulation to extend their time to answer. The EHG Group did not accept the draft stipulation prepared by the staff; they did not suggest any modifications. (96A). Because the parties could not agree upon the substance of a stipulation extending the EHG Group's time to answer (compare 96A with 98A-100A), no stipulation was ever filed.

On October 31, 1974, counsel for the EHG Group filed in the court below a "Special Appearance Without Submitting to the Jurisdiction of the Court . . ." seeking to contest the court's order of preliminary injunction and appointment of a receiver (92A-93A). 16/ In support of their various motions, the EHG Group argued, among other things, that the district court lacked jurisdiction to enter the order of preliminary injunction against them (as well as the order appointing the receiver, at least

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15/ The EHG Group was clearly in default on October 15, 1974, since the time within which they were required to file their answer had expired on October 9, 1974. See Rule 12(a) of the Federal Rules of Civil Procedure.

16/ Specifically, the EHG Group had moved: (1) to quash service; (2) to vacate the preliminary injunction; (3) to set aside default pursuant to Rules 55(c) and 60(a) of the Federal Rules of Civil Procedure; and (4) for an extension of time within which to file an answer or otherwise plead (72A-74A).

insofar as it affected them) since they had not been properly served with the summons and complaint (76A-78A). Filed in support of the motions was an affidavit executed by Ariel Gutierrez, in which he disputed some of the conclusions drawn by the Commission with respect to certain transactions described in its complaint (82A-91A).

The court held a hearing on the EHG Group's motions on November 25, 1974. After hearing arguments by counsel for the EHG Group and the Commission, the court granted the EHG Group's motion for additional time within which to file an answer to the Commission's complaint (11/25 TR. 29) [17] but denied their motion to vacate the preliminary injunction and the appointment of the receiver for the Capital Growth companies (11/25 TR. 29-30). [18] Nevertheless, because of the possibility of "excusable confusion" with respect to service of the summons and complaint (11/25 TR. 30), the district judge stated to counsel for the EHG Group:

> ". . . since you did not appear at the hearing for the preliminary injunction I will give you an opportunity to try to persuade me that you have evidence which would possibly lead me to seek a different result." (11/25 TR. 30). [19]

17/ In granting the EHG Group's request for an extension of time to answer or plead the district court effectively set aside any "default." The EHG Group never pressed its motion to quash service.

18/ In commenting on the EHG Group's arguments the court noted that it had not appointed a receiver for the assets of the EHG Group (11/25 TR. 29).

19/ In response to the inquiry of the EHG Group's counsel as to how the court wished him to proceed, the district judge indicated that counsel should "go ahead and decide what you want to do, if anything." (11/25 TR. 31).

Later during the hearing co-counsel representing the EHG Group discussed certain of the transactions that had been described in the Commission's complaint and argued that the EHG Group vigorously contested the Commission's conclusions with respect to those transactions (11/25 TR. 33-35). After listening to this discussion the district judge reiterated his offer to consider any additional evidence that the EHG Group desired to present, stating (11/25 Tr. 35-36):

> "THE COURT: I suggest that it seems to me that your principal concern is that you feel that EHG did not get a proper chance to present fully at the hearing on the preliminary injunction the papers and the evidence which you say you have, . . . but if you and Mr. Rader decide that you want to submit a further paper to me pointing out to me why you feel that there was no factual basis, no need for a preliminary injunction against EHG, as I indicated, I'll be happy to consider it.
>
> * * *
>
> MR. MAYO: How many days would you like, your honor?
>
> THE COURT: You can do it whenever you want. As promptly as you wish."

Despite this opportunity to present evidence contesting the Commission's allegations, the EHG Group chose, for whatever their reasons, not to do so (124A, n. 7).

The decision of the court below

In a memorandum opinion dated December 31, 1974 (113A-131A), the district court set forth its findings and conclusions with respect to the preliminary injunctions he had issued on September 24, 1974, and with respect to the motion of the EHG Group to vacate the injunction

and other orders as to them. Based on the uncontroverted allegations in the Commission's complaint and the documentary evidence submitted by the Commission in support of its motion for injunctive and other relief, the court found that: (1) it had subject matter and in personam jurisdiction over the defendants, including EHG (117A-121A, 125A, n. 8, 129A); (2) that the illiquid investments, non-arms-length transactions and other activities engaged in by the Capital Growth companies were part of a fraudulent scheme in which the other defendants, including the EHG Group, had participated (120A-121A; 125A, n. 8); [20/] (3) that the Commission was likely to succeed on the merits and that possible irreparable injury might result if an injunction did not issue (122A); and (4) that under the circumstances there was a likelihood of future violations (id.). Exercising his discretion the district judge determined that preliminary injunctive relief was appropriate; he also decided that, in the exercise of the court's inherent equity powers, it was appropriate to appoint a receiver for the Capital Growth companies and to seek disgorgement of misappropriated funds from all of the defendants (122A-123A).

With respect to the EHG Group's request to vacate the preliminary injunction against them, the court concluded that: (1) the EHG Group had had sufficient notice of the various hearings on the Commission's motions for interim relief to comport with the requirements of due process (127A); (2) the court had jurisdiction over the persons

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20/ Although in his opinion the district judge classified the defendants separately into three groups, including the "EHG Group," he stated that he had done this only for convenience (114A, n. 1).

comprising the EHG Group on September 24, 1974, when it issued the preliminary injunction order (129A); and (3) in any event, the EHG Group had been given the opportunity by the court, in November 1974, to submit further evidence for the court's consideration on the question of whether the preliminary injunction should have issued on the facts of the case (131A). As the court noted, "no such evidence was submitted" (124A).

ARGUMENT

I. THE EHG GROUP WAS NOT DENIED DUE PROCESS OR OTHERWISE PREJUDICED BY THE ENTRY OF A PRELIMINARY INJUNCTION AGAINST THEM WHERE THE COURT HAD JURISDICTION OVER THEIR PERSONS WHEN THE INJUNCTION WAS ISSUED, THE EHG GROUP HAD ACTUAL NOTICE OF THE PROCEEDINGS HELD IN THIS MATTER, AND THEY WERE GIVEN AN OPPORTUNITY TO PRESENT ADDITIONAL EVIDENCE TO THE DISTRICT COURT BUT CHOSE NOT TO DO SO.

On this appeal, the EHG Group argues that the preliminary injunction entered by the district court against them is invalid since, at the time the injunction was entered, the district court did not have jurisdiction over them inasmuch as they had not yet been served with copies of the summons and the Commission's complaint (Br. 14-16). The fundamental premise of the EHG Group's argument is their assertion that, while the actual signing and issuance of the order for preliminary injunction may have been delayed until September 24, 1974, so that the court could find a receiver to appoint for the Capital Growth companies,

the court in reality granted the preliminary injunction against them on September 13, 1974 (Br. 15, 21). The court below, however, specifically held (129A) [21] that it did not enter its order of preliminary injunction and appointment of a receiver until September 24, 1974 -- five days after the EHG Group concededly had been served personally with the summons and complaint in this matter (Br. 12, E-234 - E-235). [22] The record fully supports this finding.

At the hearing held on September 13, counsel for the Commission urged the court to enter preliminary injunctions against the defendants who had not appeared (59A). [23] Rather than entering the requested

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21/ In his memorandum opinion dated December 31, 1974, Judge Stewart specifically states that "the injunction was entered five days after service of the summons and complaint" (129A).

22/ The EHG Group has not produced any document signed by the district judge and dated September 13, 1974, that can be construed to be a judgment of preliminary injunction against them. Such a document is required by Rule 58 of the Federal Rules of Civil Procedure in order for any judgment to be effective. Even if a separate document is filed, the judgment is not effective until it is entered in the docket maintained for the action by the court clerk. See Rules 58 and 79(a) of the Federal Rules of Civil Procedure. The docket entry for the order of preliminary injunction entered in this case is dated September 24, 1974 (1A), the same date that the district judge issued a document captioned "Preliminary Injunction and Appointment of a Receiver" (67A). Moreover, the district judge complied with the requirements of Rule 58 in connection with the temporary restraining order dated September 3, 1974, the extension of that order on September 13, 1974, and the preliminary injunction issued on September 24, 1974. If he had intended to issue a preliminary injunction on September 13, 1974, as the EHG Group argues, he seemingly would have complied with Rule 58 at that time also.

23/ Counsel for the Commission submitted proposed orders for preliminary injunction for the court's consideration (61A-62A), but the court did not sign them.

injunctions the court directed the Commission to submit proposed findings of fact and conclusions of law for its consideration (9/13 TR. 13). It further directed the Commission to serve its proposed findings and conclusions on the three defendants who appeared at the hearing so they would have an opportunity to contest those findings which affected them (62A).

Whatever predilections the district judge may have exhibited during the September 13 hearing toward the Commission's request for preliminary injunctions and appointment of a receiver,[24/] it is clear that he did not grant those requests at that time.[25/] Instead, after the hearing had been concluded, he extended the temporary restraining order, which he originally had entered on September 3, 1974, against the defendants, including the EHG Group, for another 10-day period -- to September 23, 1974 (1A). If, as the EHG Group contends, the district judge granted a preliminary injunction against them on September 13, 1974, his action in extending the temporary restraining order would have been a meaningless gesture.

24/ In considering whether to enter a preliminary injunction against the defendants who had not appeared in the action, the district judge made it quite clear that any preliminary injunction that he might issue would be subject to modification if the non-appearing defendants appeared and asked for an opportunity to be heard (9/13 TR. 10). Indeed, more than a week after the original hearing on the Commission's request for a preliminary injunction, the district court granted just such a request by Costa Rican counsel representing the Capital Growth companies to appear to oppose the entry of a preliminary injunction (117A).

25/ The fact that the Commission counsel, on September 24, 1974, again urged that the preliminary injunctions should issue (9/24 TR. 27) indicates that they did not consider that the matter was finally determined on September 13. Counsel for Mr. Shultes and the Sheffield companies also indicated that he did not consider the matter to have been concluded on September 13 (9/24 TR. 28-29). See note 22, supra, and compare the situation in Securities and Exchange Commission v. v. Jean R. Veditz Co., Inc., 22 F.R.D. 479 (S.D.N.Y., 1958).

The record in this case clearly establishes that the district court had jurisdiction over the persons comprising the EHG Group when it issued its preliminary injunction on September 24, 1974. 26/ But implicit in the EHG Group's challenge to the validity of the preliminary injunction is a suggestion that the notice given them concerning the various hearings held in this matter was not adequate to comport with due process and that they were substantially prejudiced by the delay in serving the summons and complaint on them.

We do not dispute that copies of the summons and the complaint were not served on the EHG Group until September 19, 1974 (95A, E-324). But as the court below found (125A-129A), prior to that time the EHG Group had received adequate notice of the Commission's action against them as

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26/ On this appeal, the EHG Group's only argument with respect to in personem jurisdiction is that the district court did not have jurisdiction over them because they had not been served properly with the summons and complaint at the time the preliminary injunction was issued. Although, as we have shown, their contentions are without merit, those contentions were the only basis upon which the EHG Group defendants could have contested in personem jurisdiction. Thus, they could not successfully argue that the district court lacked in personem jurisdiction because they lacked minimal contacts with the forum since such contacts are not a prerequisite to jurisdiction. See Mariash v. Morrill, 496 F.2d 1138, 1142-1143 (C.A. 2, 1974). The fact that the EHG Group defendants are residents of Puerto Rico does not lead to any different result. See Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa.

well as the Commission's requests for a preliminary injunction and for an order appointing a receiver for the Capital Growth companies. As noted, pp. 7-8, supra, Ariel Gutierrez was orally advised on September 3, 1974, the date the Commission's action was filed, that the court below had issued an Order to Show Cause and a temporary restraining order against the EHG Group. 27/ The following day copies of the Order to Show Cause, which specified the date set for the hearing on the Commission's request for a preliminary injunction (120A), the temporary restraining order and all the papers underlying those orders were mailed, certified mail, return receipt requested, to EHG Enterprises in San Juan, Puerto Rico. 28/ In addition, counsel for the Commission orally contacted Ariel Gutierrez on two other occasions prior to the hearing: first, to advise him that the time for the hearing had been changed and second, to inquire whether he or his brother intended to appear at the hearing. (94A-95A).

27/ Copies of the complaint and other papers in this action were delivered on September 3 to Stroock & Stroock & Lavan (93A). While we do not contend that delivery of those papers to the Stroock firm constituted effective service of process on the EHG Group, it did provide the Group with additional actual notice of the Commission's action against them. Thus, after receiving the call from the Commission's counsel, Ariel Gutierrez contacted the Stroock firm to discuss the matter (75A).

28/ Among the documents annexed to the Commission's motion for an Order to Show Cause was the Lanzotti affidavit, which, as noted, detailed the substance of the allegations in the Commission's complaint against the EHG Group.

In light of the foregoing the EHG Group defendants cannot, and indeed they do not, deny that they received timely, actual notice that the hearing on the preliminary injunction was scheduled for September 13, 1974.[29/] They imply, however, that no matter what notice was given, it was totally ineffectual since they had not yet been personally served with copies of the summons and complaint. This contention is without merit. In Securities and Exchange Commission v. Dumont Corp., 49 F.R.D. 342, 345 (S.D.N.Y., 1969), the defendant argued, as the EHG Group defendants apparently do here, that notice mailed to him of a hearing for a preliminary injunction was improper because he had not been served with the summons and complaint before the notice was given. The district court rejected this "hypertechnical argument" stating that if such an argument were sustained, defendants would be encouraged to avoid service of process "and thereby obstruct and delay the administration of justice." Id. [30/] Even if there was some error in the manner in which notice was given, the court stated that it would generally consider it harmless unless the defendant could show specific prejudice as a result. Id. at 345, n. 8.

29/ See Plaquemines Parish School Board v. United States, 415 F.2d 817, 823-824 (C.A. 5, 1969), where it was held that the service of an Order to Show Cause was sufficient to provide notice for a hearing on a preliminary injunction.

30/ Under the Federal Rules of Civil Procedure, a federal civil action is commenced by the filing of a complaint (Rule 3) and not by service of the summons and complaint. See McCrea v. General Motors Corp., 53 F.R.D. 384 (D. Mont., 1971). The federal rules reflect the practical consideration that service of the summons and complaint may not always be effected immediately. Thus, the Rules do not require service to be effected within any particular time after the complaint has been filed. Messenger v. United States, 231 F.2d 328, 329 (C.A. 2, 1956). An unreasonable delay in serving the summons and complaint, however, could be the basis for dismissing the action for lack of prosecution. Id.

The EHG Group seeks to distinguish the Dumont case on the ground that the defendant there was served with the complaint prior to the hearing on the preliminary injunction while in the case at bar the EHG Group was not properly served with copies of the summons and complaint until after the hearing on the preliminary injunction had been held (Br. 23). But in both cases the defendants were properly served before the preliminary injunction was entered. While it is true that the defendant in Dumont had an opportunity to contest the entry of a preliminary injunction at the initial hearing, we submit that the EHG Group had ample opportunity to contest the Commission's request for a preliminary injunction prior to its actual entry.

As of September 19, 1974, the EHG Group had received a copy of the Commission's complaint which was in addition to the detailed affidavit of Jerald A. Lanzotti mailed to them on September 4 (94A, E-324); they had been given actual notice of the Commission's request for a preliminary injunction (95A); and they had not been served with any orders or other documents indicating that the district court had disposed of the motion. Rather than contesting the allegations in the Commission's papers or otherwise urging that the preliminary injunction should not be granted, the EHG Group did nothing. They did not inquire as to what, if any, additional evidence was adduced at the hearing on September 13,[31/] nor did they inquire of anyone as to the status of the Commission's motions. Indeed, they were not even sure that the hearing scheduled

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31/ In fact, the September 13 hearing was not an evidentiary hearing since, as noted, seven of the ten defendants did not appear and the three defendants who did appear agreed with the staff to a postponement of the hearing as to them until October 21, 1974. See note 9, supra, and accompanying text.

for September 13 had been held (75A). The EHG Group did not appear in this action or respond to the Commission's application for a preliminary injunction until more than five weeks after the injunction had been entered.

We do not suggest that the EHG Group defendants were under any obligation to appear at the September 13 hearing and voluntarily submit themselves to the jurisdiction of the district court. 32/ But once they were personally served with copies of the summons and complaint on September 19, 1974, their failure to appear or respond to the Commission's as-yet-undecided motion for a preliminary injunction was at their own peril.

In any event, on October 31, 1974, the EHG Group filed its "Special Appearance," among other things, to quash service and to vacate the preliminary injunction entered against them. At a hearing held on the various motions filed by the EHG Group, the district judge concluded that, even though the court did have personal jurisdiction over these defendants and that the notice given them was sufficient, he would consider any further evidence that they wished to introduce to show why the preliminary injunction was unnecessary or inappropriate (11/25 TR. 30-31, 33, 35-36). These defendants, however, did not avail themselves of that offer (124A, n. 7).

32/ The district court found that a valid preliminary injunction could not have been issued on September 13 in the absence of personal jurisdiction over the EHG Group (128A-129A); we do not disagree.

We submit that, under the circumstances of this case, the district judge correctly concluded that the court had personal jurisdiction over the EHG Group defendants when it issued the preliminary injunction against them (129A); that these defendants had actual notice of the proceedings in this matter and that such notice was sufficient (130A); and that these defendants were not prejudiced by any delay in serving the summons and complaint on them (130A-131A). The EHG Group had had more than sufficient opportunity to contest the Commission's allegations both prior to the granting of the preliminary injunction on September 24 and again when the district court granted their request to reconsider the preliminary injunction (124A). Due process does not demand more. See Securities and Exchange Commission v. North American Research & Development Corp., Dkt. No. 74-1750 (C.A. 2, February 24, 1975).

On this appeal the EHG Group defendants, in effect, are seeking an order from this Court directing the district court to reconsider the granting of the preliminary injunction. But that is precisely what the court below offered to do on November 25 and what these defendants declined to pursue.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION WHERE THE UNCONTESTED FACTS DEMONSTRATE THAT THE EHG GROUP DEFENDANTS PARTICIPATED IN FRAUDULENT ACTIVITIES THAT DEPRIVED THE CAPITAL GROWTH COMPANIES OF VALUABLE ASSETS.

The EHG Group defendants have not disputed that the transactions involving them, which the Commission alleges to have been fraudulent, in fact occurred as described in the complaint (4A-19A-ii) and the affidavit

of Jerald A. Lanzotti filed in support of the Commission's request for a preliminary injunction (33A-47A); indeed most of these transactions are confirmed in the affidavit filed by Ariel Gutierrez in the court below (82A-91A).[33/] What these defendants dispute are the conclusions to be drawn from the facts surrounding those transactions.[34/] They assert that the transactions in issue were "conducted at arms-length and in a completely honest and legitimate manner" (Br. 30) and that the only relationship between the EHG Group and the Capital Growth companies was "a simple business relationship" (id.). But the only reasonable conclusion to be drawn from the undisputed facts is that the EHG Group participated in non-arms-length transactions with other defendants that resulted in substantial benefits for some defendants at the expense of the Capital Growth companies and their public shareholders.

33/ While Ariel Gutierrez denied some of the conclusionary allegations of the Commission's complaint in the affidavit he executed and filed in support of the EHG Group's various motions (see p. 14, supra), the district court considered the primary objective of that affidavit to be to establish the good faith of EHG and the Gutierrez brothers with respect to their transactions with the Capital Growth companies. But as the district judge noted, good faith would not necessarily be a defense to liability for violation of the antifraud provisions of the federal securities laws in a Commission injunctive action (124A, n. 7) when the defendant knew or should have known of the fraudulent activity. Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (C.A. 2, 1972). See Securities and Exchange Commission v. Management Dynamics, Inc., [Current Binder] CCH Fed. Sec. L. Rep. ¶95,017 at p. 97,569 (C.A. 2, March 18, 1975).

34/ Since the dispute appears to be solely in connection with the conclusions to be drawn from the underlying facts, and not the facts themselves, the district court was not required to hold an evidentiary hearing. See Securities and Exchange Commission v. Frank, 388 F.2d 486 (C.A. 2, 1968).

The EHG Group defendants assert, for example, that the sale by EHG in September, 1969, of 200,000 shares of its common stock to the Capital Growth companies for $2.05 million was an arms-length transaction (Br. 34). Yet at the time of this transaction, which was a departure from the types of investments the Capital Growth companies usually made, 35/ those companies paid EHG approximately $1.4 million more than the value of the equity interest received in EHG, a company which had been in existence for less than seven months (E-183, E-201, E-240). 36/ Apparently in connection with this overpayment of $1.4 million, immediately after the sale, the EHG Group transferred a significant amount of the proceeds to other defendants who were affiliated with the Capital Growth companies. Thus, the EHG Group paid New Providence Securities--the investment manager of the Capital Growth companies controlled by defendant Clovis McAlpin--a brokerage commission of $100,000 in connection with the stock sale (11A, 40A, 89A) and they also loaned New Providence another $400,000 (40A, 88A).

35/ For example, the following representations were included in Capital Growth prospectuses (36A):

> "Capital Growth Fund is one of the few mutual funds operating outside of the United States whose underlying investments are primarily in United States securities . . . .
>
> * * *
>
> Capital Growth's investments are primarily in companies of large growth potential with emphasis on United States industry. Selected investments will be made in other areas of rapid economic growth and financial and political stability."

See also E-69.

36/ The agreement between EHG and the Capital Growth companies prohibited the resale of the shares by the Capital Growth companies for a period of three years (E-183).

In addition they used another $400,000 of the proceeds to purchase bonds of a Costa Rican political party headed by Jose Figueres (E-290-E-291), at a time when Mr. Figueres' family was a co-venturer with the Capital Growth companies in another business venture. 37/ The gross over-payment made by the Capital Growth companies for the EHG stock, coupled with the immediate rechanneling of a significant portion of the proceeds of the stock sale to individuals and organizations that controlled or had other relationships with the Capital Growth companies, virtually compels the conclusion that the transaction was anything but arms-length and that EHG was acting solely as a conduit to funnel funds from the Capital Growth companies to those other individuals and organizations. Subsequent events substantiate this conclusion.

On September 10, 1974, the three year prohibition on the sale of the EHG shares by the Capital Growth companies expired. 38/ Just four days later, Ariel Gutierrez repurchased the same 200,000 shares. Although

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37/ In his affidavit, Ariel Gutierrez maintains that the loan to New Providence and the purchase of the bonds were only business investments made in the normal course of EHG's business (88A-89A). Yet only one week prior to the loan and bond purchase, EHG stated in a prospectus filed with the Securities Office of the Department of the Treasury of the Commonwealth of Puerto Rico that the proceeds from the sale of EHG stock to the Capital Growth companies were to be used in connection with specific real estate projects in Puerto Rico, the Virgin Islands, the Bahamas and Florida (E-207 - E-209). Although EHG did disclose the $100,000 brokerage commission to New Providence (E-202), no mention was made of any loan to New Providence or a purchase of political bonds.

38/ See note 36, supra.

the transaction was structured so that he purchased the shares from an individual named J. H. Burke, it was apparent that Mr. Burke was acting as an intermediary for the Capital Growth companies 39/ -- in substance, the transaction was between Mr. Gutierrez and the Capital Growth companies.

Ariel Gutierrez stated that he paid $1.3 million to repurchase the EHG shares (84A). Yet the Capital Growth companies, which should have been the real beneficiaries of the sale, received only $1 million from the sale (42A; E-156). Mr. Gutierrez disclaims any knowledge of this $300,000 discrepancy at the time of the transaction or of a letter addressed to him and signed by J. H. Burke in which Mr. Burke indicated that the purchase price for the shares was $1 million, plus commissions (85A).

In any event, whether Mr. Gutierrez paid $1 million or $1.3 million, the timing and substance of the transaction lead to but one conclusion -- that it was the liquidation of a complex transaction between EHG and the Capital Growth companies which began in September, 1969, and the result of which was to deprive the Capital Growth companies of valuable assets while directly benefitting the participants in the scheme. 40/

The EHG Group engaged in other transactions with the Capital Growth companies that resulted in the loss of substantial liquid assets by

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39/ Mr. Burke "purchased" the EHG shares from the Capital Growth companies on the same date that he purportedly sold those same shares to Ariel Gutierrez (E-258; E-263). According to Mr. Gutierrez, these transactions were effected "[o]n the same date, at the same place, in the presence of the same witnesses . . . ." (84A).

40/ The EHG Group claims that this sale and repurchase transaction with the Capital Growth companies was arms-length and that the difference in the price of the EHG stock represented a change in economic conditions (Br. 34). It should be noted, however, that at the time the Capital Growth companies purchased the shares for $2.05 million, EHG was a new company with a limited record and a shareholders equity of $2.7 million, and at the same time of the sale back to EHG for $1.3 million, EHG had a more substantial business record and a shareholders' equity of $5.4 million (E-183).

those companies. Thus, in December, 1969, Transcaribbean Real Estate Properties, Inc., which was wholly-owned by Capital Growth Real Estate Fund, Inc., acquired a 50% interest in four parcels of undeveloped land in Puerto Rico from Condotel, Inc., a subsidiary of EHG for $3 million (90A; E-183). 41/ In connection with this transaction the Capital Growth Management Company, which was the management company of the Real Estate Fund and a majority-owned subsidiary of New Providence, received a "commission" of $180,000 from the EHG Group (43A, 90A).

On August 1, 1971, the Real Estate Fund sold all of its shares in Transcaribbean to Golden Beach Apartments Corporation, which was the successor to Condotel, Inc., for $1.6 million (90A; E-184). Payment for those shares was in the form of four notes of Golden Beach payable to Real Estate Fund 42/ on dates extending from December 31, 1971 to December 31, 1974 (E-184). From time to time, it appears that the due dates on the notes from Golden Beach to Real Estate Fund have been extended (90A-91A); only one has been repaid to date. 43/ The effect of this purported "legitimate business

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41/ Of this amount, Transcaribbean paid Condotel approximately $480,000 in cash and assumed approximately $1.52 million in outstanding mortgages on the properties (E-183).

42/ On August 12, 1971, Capital Growth (Costa Rica) acquired substantially all of the net assets of the Capital Growth Real Estate Fund (38A). Prior to that time, however, Capital Growth (Costa Rica) and Capital Growth Real Estate Fund in effect were under the common management of New Providence Securities and Clovis McAlpin (43A, 90A). Cf. E-202.

43/ On November 20, 1972, a payment of $552,000 was made to Capital Growth representing principal and interest on the first note (E-185). The EHG Group asserts that they paid $20,000 to extend the due dates of the loans plus an additional $60,000 in financial and advisory fees (90A-91A). There is no record that the Capital Growth companies ever received any of this money (E-160); even the $20,000 was wired to Clovis McAlpin's account and not Capital Growth's (E-312).

deal" (Br. 36) was to convert at least $1.13 million in cash of the Capital Growth companies into $1.6 million in notes of a wholly-owned subsidiary of EHG.[44/]

As a result of these and other real estate transactions involving EHG and the Capital Growth companies, EHG was able to post profits when it otherwise would have had losses, and it may have been able to borrow more funds from other sources on certain properties because of the stepped-up bases on those properties (E-160).[45/]

The EHG Group defendants argue that the district court abused its discretion in issuing a preliminary injunction against them since, in their view, the Commission has not presented "a sufficiently strong case . . ." (Br. 29). But, as shown above, the facts presented by the Commission in support of its motion for a preliminary injunction, which the district court found the EHG Group had not contested (124A, n. 7), establishes the requisite "strong prima facie case to justify the discretionary issuance of the interlocutory restraint." Securities and Exchange Commission v. Boren, 283 F. 2d 312, 313 (C.A.2, 1960).

44/ As noted, Transcaribbean was a wholly-owned subsidiary of Capital Growth Real Estate; its initial capitalization of $20,000 was supplied by Real Estate. In connection with the transaction described in the text, Real Estate advanced $480,000 to Transcaribbean in order that Transcaribbean could pay EHG the cash portion of the $3 million purchase price for the 50% interest in the properties it acquired from Condotel, the wholly-owned subsidiary of EHG. Real Estate also advanced to Transcaribbean an additional $780,000 that presumably was used to meet mortgage payments and other expenses of those properties, which were Transcaribbean's only assets. Adjusting the amount of cash that Real Estate gave to Transcaribbean by a refund of $150,000 that Transcaribbean paid to Real Estate, the total outflow of assets from Real Estate to Transcaribbean was $1.13 million. (E-183 - E-184).

45/ These conclusions are based on an audit of the Capital Growth companies and an examination of the certified financial statements of EHG (E-160).

The EHG Group defendants urge, nevertheless, that the entry of the preliminary injunction by the district court was improper since the Commission did not show that irreparable injury would result in the absence of an injunction (Br. 31-32), citing Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (C.A. 2, 1973).[46/] This Court, however, in Securities and Exchange Commission v. Management Dynamics, Inc., et al., [Current Binder] CCH Fed. Sec. L. Rep. ¶95,017 (C.A. 2, March 18, 1974), recently held that the standards enunciated in the Sonesta case are not applicable in a Commission injunctive action.[47/] Thus, as Chief Judge Kaufman stated (at p. 97,567):

> "Unlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are 'creatures of statute.' '[P]roof of irreparable injury or the inadequacy of other remedies as in the usual suit for injunction' is not required." [citations omitted].

The rationale underlying this rule is that the Commission does not appear in such lawsuits as an ordinary litigant, "but as a statutory guardian

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46/ The EHG Group also cites (Br. 32) the Supreme Court's decision in Sampson v. Murray, 415 U.S. 61 (1974) and suggests that the Court there held that irreparable injury was a necessary element for all injunctions. The defendants read that case too broadly. In discussing whether injunctive relief is available in a certain class of cases the Court noted, 415 U.S. at 84:

> "Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases."

Contrary to the suggestion of the EHG Group, the Court in that case did not establish irreparable injury as a general prerequisite for all preliminary injunctions.

47/ Even if the standards set forth in Sonesta were applicable in this case, the district court held that they had been met (122A).

charged with safeguarding the public interest in enforcing the securities laws." Id. Under these circumstances to require the Commission to show irreparable injury as a prerequisite to obtaining injunctive relief would jeopardize "effective enforcement of the securities laws . . . ." Id.

In considering whether to issue an injunction the critical question for a district court is whether there is a reasonable likelihood that a wrong will be repeated. While this Court has held that the fact of a past violation does not automatically justify the issuance of an injunction, "the commission of past illegal conduct is highly suggestive of the likelihood of future violations." Id. at p. 97,566. In considering the totality of circumstances, "factors suggesting that the infraction might not have been an isolated occurrence are always relevant." Id. [48/]

In an action involving "remedial" statutes such as the Securities Act of 1933 and the Securities Exchange Act of 1934, [49/] a district court has broad discretion to enjoin possible future violations of law where past violations have been shown and there is a reasonable likelihood of future violations; a lower court's determination that the public interest requires the imposition of a restraint should not be disturbed on appeal unless it appears that there has been a clear abuse of that discretion. Securities

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48/ Even if the EHG Group has ceased their illegal activities - a contention they do not make - that would not compel denial of the injunction. Id. at p. 97,566; Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (C.A. 2, 1972); see United States v. Parke, Davis & Co., 362 U.S. 29, 47-48 (1960).

49/ See Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Superintendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6, 12 (1971); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); cf. Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (C.A. 2, 1972); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 250 (C.A. 2, 1959).[50/] The burden is on the party seeking to overturn the district court's exercise of discretion, and the burden necessarily is a heavy one. Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100. Ordinarily, an appellate court will not substitute its views for those of the district court unless it can be shown clearly that there was no basis for the lower court's determination. United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

The repeated violative activities of the EHG Group establish that the district court did not abuse its discretion in granting injunctive relief in this case. Although the court below did not make a specific finding that the EHG Group defendants were likely to engage in future illegal activities, a finding that they likely would commit future violations "is implicit in [the] district court's conclusion that an injunction is necessary for the protection of the public interest." Securities and Exchange Commission v. Management Dynamics, Inc., et al., supra, ¶ 95,017 at p. 97,566; see Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 250.

50/ Accord United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953); Hecht Co. v. Bowles, 321 U.S. 321 (1944); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306-1307 (C.A. 2), certiorari denied, 404 U.S. 1005 (1971); Securities and Exchange Commission v. MacElvain, 417 F.2d 1134, 1137 (C.A. 5, 1969), certiorari denied, 397 U.S. 972 (1970); United States v. Article of Drug, Etc., 362 F.2d 923, 928 (C.A. 3, 1966); Beneficial Finance Co. of Wisc. v. Wirtz, 346 F.2d 340, 344 (C.A. 7, 1965).

The EHG Group defendants also suggest that injunctive relief against them was improper since "[t]here is no evidence of fraud or deceit . . ." on their part and because they did not have any knowledge of the activities of the Capital Growth companies or the other defendants (Br. 36). Insofar as the EHG Group defendants are suggesting that the Commission must show some form of scienter in order to obtain injunctive relief they are mistaken. See, e.g., Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1096; Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-855 (C.A. 2, 1968) (en banc), certiorari denied, 394 U.S. 976 (1969).

In injunctive actions brought by the Commission the applicable standard is whether the defendant caused or aided or abetted a violation of the federal securities laws. Securities and Exchange Commission v. Management Dynamics, Inc., et al., supra, ¶94,017 at p. 97,569; Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d 535, 541-542 (C.A. 2, 1973); Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1095. In the case at bar, the uncontested facts presented by the Commission amply demonstrate a pattern of mutual accommodation between the EHG Group and Clovis McAlpin and New Providence Securities to use the assets of the Capital Growth companies for their own benefit. We submit that, in light of the frequency, timing and substance of these transactions between the EHG Group and the Capital Growth companies, the court below could reasonably and properly infer that the EHG Group defendants had knowledge of the illegal purposes of the transactions. Even if the EHG Group defendants did not have actual

knowledge, we submit that based on the uncontroverted facts, they "should have been able to conclude that . . .[their acts were] likely to be used in furtherance of illegal activity." Securities and Exchange Commission v. Management Dynamics, Inc., et al., supra, ¶ 95,017 at 97,569; see Securities and Exchange Commission v. Spectrum, Ltd., supra, 489 F.2d at 451; Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1095.

CONCLUSION

For the foregoing reasons, the decision of the court below to continue its preliminary injunction against the EHG Group defendants should be affirmed.

Respectfully submitted,

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April 1975

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - CAPITAL GROWTH COMPANY, S.A. (Costa Rica) CAPITAL GROWTH COMPANY, S.A. (Panama) NEW PROVIDENCE SECURITIES, LTD., S.A. SHEFFIELD ADVISORY COMPANY SHEFFIELD ADVISORY COMPANY, S.A. EHG ENTERPRISES, INC. CLOVIS W. McALPIN SANFORD C. SHULTES ARIEL E. GUTIERREZ ENRIQUE H. GUTIERREZ, Defendants.	74 Civ. 3770 (CES) ORDER

Plaintiff Securities and Exchange Commission ("Commission") having moved for a preliminary injunction, appointment of a receiver, and such other and further relief as this Court may deem just and appropriate and pending hearing thereon a temporary restraining order, and this Court having issued a temporary restraining order on September 3, 1974 and this Court having today ordered the extension of the temporary restraining order on consent as against defendants Sheffield Advisory Company, Sheffield Advisory Company, S.A. and Sanford C. Shultes to and including October 21, 1974, and good cause having been shown by the Commission for extension of the temporary restraining order against the remaining defendants, it is hereby

ORDERED that the temporary restraining order issued by this Court on September 3, 1974 be and it hereby is extended as to defendants Capital Growth Company, S.A. (Costa Rica), Capital

Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutierrez and Enrique H. Gutierrez to and including September 23, 1974.

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 13, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have mailed two copies of the ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION in Securities and Exchange Commission v. Capital Growth Company, et al., to each of the following counsel:

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April 18, 1975